In the Supreme Court

Appeal from the Court of Appeals
Honorable Donald S. Owens

SHARON BARNES AND TIM BARNES,
Plaintiffs-Appellees,

v.

Docket No. 123661

DR. IVANA VETTRAINO, DR. WILLIAM BLESSED, PROVIDENCE HOSPITAL, AND MICHAEL ROTH, M.D.,
Defendants-Appellants,

and

JANE DOE,
Defendant.

BRIEF ON APPEAL - APPELLANTS IVANA VETTRAINO, M.D., WILLIAM BLESSED, M.D., AND PROVIDENCE HOSPITAL

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

Defendants Dr. Vettraino, Dr. Blessed and Providence Hospital moved for summary disposition before Oakland County Circuit Court Judge Nanci Grant on or about July 5, 2000, submitting that plaintiffs' cause of action is not recognized in Michigan under the controlling case of Taylor v Kurapati, infra (Appendix p 88a)[1]. After a hearing on September 13, 2000, Judge Grant denied the motion by order entered on October 13, 2000 (Appendix p 84a). These defendants subsequently filed an application for leave to appeal with the Court of Appeals, which was denied by order entered on December 15, 2000 (Appendix p 86a). Defendants then filed an application for leave to appeal with this Court. On July 10, 2001, this Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted (Appendix p 87a). After full briefing and argument, the Court of Appeals issued, on March 25, 2003, an unpublished per curiam, two to one, opinion (Donald S. Owens, P.J. and Michael F. Cavanagh, J., with William B. Murphy, J. dissenting) affirming the trial court's order denying summary disposition (Appendix p 88a). These defendants timely filed an application for leave to appeal with this Court, which was granted by order entered on July 15, 2004. This Court has jurisdiction pursuant to MCR 7.301(A)(2) and MCR 7.302.

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[1] Co-defendant Dr. Roth filed, on or about August 4, 2000, an answer to the complaint (after the filing of this motion).

STATEMENT OF QUESTIONS PRESENTED

I. **Whether a cause of action for damages associated with the decision to undergo an abortion should not be recognized and should be held by this Court to be precluded under Michigan law?**

Plaintiffs argue the answer is "No."

Defendants Providence, Vettraino, & Blessed submit the answer is "Yes."

Defendant Roth submits the answer is "Yes."

The trial court held the answer is "No."

The Court of Appeals held the answer is "No."

II. **Whether based on the wrongful conduct rule, plaintiffs should not be allowed to recover for an abortion procedure which this state has declared illegal and a criminal act?**

Plaintiffs argue the answer is "No."

Defendants Providence, Vettraino, & Blessed submit the answer is "Yes."

Defendant Roth submits the answer is "Yes."

The trial court did not address this issue.

The Court of Appeals did not address this issue.

STATEMENT OF FACTS

In this medical malpractice action, plaintiffs, Sharon and Tim Barnes, seek damages for injuries allegedly suffered because of an alleged failure to timely inform the plaintiffs that the fetus Mrs. Barnes was carrying would be born with genetic birth defects. There is no claim that such defects were caused by any negligent act or omission of the defendants. Plaintiffs claim that Mrs. Barnes was thus prevented from aborting the child at an earlier date causing Mrs. Barnes to secure a late term abortion in Kansas. The issue raised in this appeal is whether the plaintiffs have a legally recognized cause of action in the state of Michigan.

A. Complaint Allegations

On May 19, 2000, plaintiffs filed their complaint alleging that Sharon Barnes learned in the spring of 1998 that she was pregnant and that she had an estimated due date of February 25, 1999 (Appendix p 4a, ¶9).[2] An amniocentesis and ultrasound were performed on September 17, 1998 (Appendix p 5a, ¶18). The complaint alleges that plaintiffs advised co-defendant, Dr. Michael Roth, that if the amniocentesis indicated abnormalities the Barnes would terminate the pregnancy (Appendix p 4a, ¶12). The complaint asserts that on September 23, 1998, defendant Dr. William Blessed contacted Sharon Barnes advising her that the tests for Down's Syndrome was negative but that the fetus had 47 chromosomes including a partial number 9 and a marker on 21 (Appendix p 5a, ¶19). It is alleged that Mrs. Barnes was advised that if either she or her husband had the same set of chromosomes, that the results were normal (Id.).

Subsequently, on September 28, 1998, the Barnes presented to Dr. Ivana Vettraino's office for DNA testing (Appendix p 5a, ¶20). The complaint further alleges that on September 30, 1998, Dr. Blessed received a report on the amniocentesis indicating that the fetus was abnormal (Appendix p 5a, ¶21). At that time, the baby was approximately 17.5 weeks of age (Appendix p 5a, ¶21). According to the complaint on October 9, 1998, Drs. Vettraino and Blessed received a follow-up report on the amniocentesis which stated that there was an abnormal karyotype (a photomicrograph

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[2] A notice of intent had been previously mailed on or about October 6, 1999.

of a single cell at the stage of division) which could reasonably be expected to be associated with birth defects and significant mental retardation (Appendix p 5a-6a, ¶22). The complaint alleges that the fetus at this time was approximately 19 weeks of age (Appendix 6a, ¶22). The complaint further alleges that on October 14, 1998, the Barnes were subsequently informed by a nurse that both she and her husband's genetic make-up matched that of the baby's (Appendix p 6a, ¶23-24). According to the complaint, the October 7, 1998 report indicated that the baby had a gestational age on October 14, 1998 of approximately 20 weeks (Appendix p 6a, ¶25).

On November 16, 1998, plaintiffs allege that the baby had a gestational age of approximately 22 to 23 weeks (Appendix p 6a, ¶27). On November 18, 1998, the Barnes were allegedly advised by Dr. Vettraino that the baby had a Trisomy 9 and would have major health problems and deformities (Appendix p 6a, ¶29). The Barnes subsequently decided to terminate the pregnancy and traveled to Kansas for an abortion during the week of Thanksgiving (November 22-27, 1998) (Appendix p 7a, ¶¶34-35). Plaintiff Sharon Barnes seeks recovery for damages she alleges to have sustained as a result of not being able to choose to have an abortion at an earlier date (Appendix p 7a-8a, ¶¶38-43). Her husband, Tim Barnes, seeks loss of consortium (Appendix p 8a, ¶44).

B. Motion for Summary Disposition

On June 30, 2000, these defendants moved for summary disposition on the basis that the Court of Appeals' decision in Taylor v Kurapati, infra, controls requiring dismissal of plaintiffs' complaint (Appendix p 10a). In Taylor, the Court of Appeals held, based on public policy considerations, that a cause of action for wrongful birth based upon a physician's failure to timely warn parents of a possible birth defect was not actionable in Michigan. Defendants submitted that the Taylor decision goes to the essence of the plaintiffs' claim in this case and that therefore their cause of action is precluded (Appendix p 11a & 14a). In response, plaintiffs argued that this was not a wrongful birth claim since the plaintiffs ultimately secured an abortion (Appendix p 58a). A brief in reply was filed by these defendants, to which plaintiffs filed a response (Appendix p 71a & p 75a).

A hearing on the summary disposition motion was conducted on September 13, 2000, at which time the trial court denied the motion (Appendix p 77 a). The trial court concluded that Taylor is not controlling since the plaintiffs were not seeking to recover damages for the fact that a child was born with deficiencies and abnormalities but were rather seeking "compensation for having to undergo an abortion procedure that was more complicated and expensive than would have been required" if plaintiffs had been informed of the child's defects at an earlier date since plaintiffs would have secured an earlier abortion (Appendix pp 81a-82a). An order denying the motion for summary disposition was entered on October 13, 2000 (Appendix p 84a).

C. Appellate Proceedings

Subsequently, on November 3, 2000, these defendants filed with the Court of Appeals an application for leave to appeal seeking review of the trial court's order. By order entered on December 15, 2000, the Court of Appeals denied the application for "failure to persuade the Court of the need for immediate appellate review" (Appendix p 86a). On January 4, 2001, defendants filed an application for leave with this Court. In lieu of granting leave, this Court, by order of July 10, 2001, remanded the case to the Court of Appeals for full briefing and argument (Appendix p 87a).

After briefing and oral argument, the Court of Appeals issued an unpublished per curiam opinion on March 25, 2003 (Appendix p 88a). In a two to one majority, the Court of Appeals affirmed the trial court's order denying summary disposition. Judges Donald S. Owens and Mark J. Cavanagh held that plaintiffs' cause of action was not barred by the Court of Appeals' prior ruling in Taylor since the Taylor decision only "narrowed the scope of compensable injuries by abolishing the so-called 'wrongful birth' cause of action" (Appendix p 89a). While recognizing that the Taylor opinion was based on a recognition that "continuing to recognize the 'wrongful birth' cause of action would lead down a 'slippery slope' to the logical conclusion that a 'defective child' once born should not be allowed to continue living," the majority nonetheless concluded that the damage element in this case distinguishes the instant matter from a "wrongful birth" cause of action since essentially plaintiffs chose to abort the child in this case (Appendix p 90a). The Court of Appeals concluded

that since the child was aborted, the jury would not be invited to weigh the cost of a child being born against the lost benefit of the child not being born (Appendix p 90a).

Judge William B. Murphy dissented, concluding, in contrast, that the plaintiffs' cause of action is barred and that summary disposition should have been granted (Appendix p 92a). Noting that the public policy of the state of Michigan is to favor life and proscribe elective abortion, Judge Murphy stated the "case law in this state supports this basic principle by prohibiting certain causes of action dealing with subjects of reproduction, contraception, and the decision to avoid or terminate pregnancy where negligence has occurred" (Appendix p 92a-93a). Judge Murphy concluded that the Court of Appeals' decision in Taylor v Kurapati, required the current Court of Appeals "to hold that plaintiffs here would have no cause of action against defendants because the essence of plaintiffs' claim is that defendants failed to provide Mrs. Barnes with accurate and timely information that would have made her more likely to have an elective abortion" (Appendix p 94a).

> I find it to be a contradiction to say in one breath that the policy of this state favors life and proscribes abortion, and in another breath rule that a party can recover civil damages through the Michigan legal system arising out of a choice to have an abortion, where no damages, in negligence actions, are recoverable for wrongful birth if the choice is to give birth. The majority opinion opens the door to lawsuits for damages associated with an elective abortion decision under not only circumstances that exist here, but situations where a woman conceives through the negligence of a defendant. If plaintiffs are permitted to pursue their action and recover damages, so can any other party who alleges a negligent act that led to the painful decision to terminate a pregnancy. **The majority has necessarily embraced a new cause of action for wrongful infliction of abortion, or in other words, a cause of action for damages associated with the decision to undergo an abortion**. [Appendix p 94a; emphasis added.]

SUMMARY OF ARGUMENT

There is no claim in this action that defendants caused any defects or abnormalities to the fetus that Mrs. Barnes was carrying. Rather, the claim is that a failure to provide information at an earlier date regarding the genetic makeup of the fetus required Mrs. Barnes to seek a late term abortion in the state of Kansas. Plaintiffs seek damages related to this abortion procedure. Thus, plaintiffs' cause of action is essentially based on an alleged loss of the right to abort a child. Defendants submit that such a cause of action should be precluded in the state of Michigan. This state has an interest and declared policy of favoring life over abortion. This stated public policy has been set forth in numerous legislative enactments, including statutory provisions precluding abortion once viability is reached. In this case, based on the complaint allegations, this fetus would have been at least 23 ½ to 25 weeks gestational age. Based on established case law, viability was entirely possible. Thus, the abortion procedure secured by Mrs. Barnes in the state of Kansas was a procedure which would have been illegal under the penal code of the state of Michigan. As set forth by numerous statutes and significant case law, this state has repeatedly reaffirmed its interest in favoring birth over abortion. This Court should not allow a party to recover damages based on a decision to secure an abortion. Such would be directly contrary both to the public policy repeatedly expressed by our Legislature and to the rightful pronouncements of the appellate courts. Application of the wrongful conduct rule also precludes recovery since the abortion procedure which plaintiff ultimately secured and for which she bases her damages claim is a procedure which would be illegal in the state of Michigan.

Further, allowing such a cause of action to stand would require a jury to place a monetary value on the suffering incurred in undergoing a late term abortion offset by any pain and suffering awarded by not giving birth to a potentially impaired child. Such a determination will essentially require a jury to place value on a human life. The jury would also be provided with the arduous task of delineating the pain and suffering associated with a "normal"abortion as such will need to be set off against the abortion procedure ultimately performed here. Under Taylor v Kurapati, infra the jury

will have the burden of determining the plaintiffs' comparative negligence in proceeding with the abortion or the plaintiffs' failure to mitigate damages by not seeking an abortion. The above damages comparisons are ones which the law cannot and should not make.

As this Court has recognized in the past, the law cannot redress every injury and a determination regarding where to draw the line of liability is a question of policy which is for the Legislature and not the courts to determine. Here, plaintiffs wish to seek damages for pain, suffering, mental anguish and emotional distress which allegedly occurred as a result of an abortion procedure elected by plaintiff to be performed in another state where such procedure was illegal in the state of Michigan. Such cause of action is directly contrary to and in contravention of the declared policy and interests of this state. Such recovery should be precluded.

ARGUMENT

A cause of action for damages associated with the decision to undergo an abortion, which procedure would be illegal in Michigan based on the dates of viability alleged in the complaint, should not be recognized in the state of Michigan.

Plaintiffs allege that a failure to provide information at an earlier date regarding the condition of the fetus Mrs. Barnes was carrying required Mrs. Barnes to seek a late term abortion in the state of Kansas. There is no claim that defendants caused the defects or abnormalities. Plaintiffs concede that the deficiencies and abnormalities were genetically based. Rather, plaintiffs seek damages for the expenses and mental distress in securing an abortion. This cause of action, which Court of Appeals Judge William B. Murphy aptly described as essentially a claim for wrongful infliction of abortion, should not be recognized in the state of Michigan. Such a claim is directly contrary to the public policy of this state.

The Court of Appeals and the trial court, bound by the controlling precedent set forth by the Court of Appeals in Taylor v Kurapati, infra, should have dismissed this action. Plaintiffs have never argued that Taylor was wrongly decided, only that Taylor should not apply where the damage claim is based on securing an abortion. Defendants submit that Taylor in fact did control the lower courts and that nonetheless, this Court should affirmatively conclude that such a cause of action cannot and does not exist in this state.

A. Standard of review

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. Summary disposition should be granted where the claim is unenforceable as a matter of law and no factual development could possibly justify recovery. Maiden v Rozwood, 461 Mich 109, 119; 597 NW2d 817 (1999); Spiek v Mich Dept of Trans, 456 Mich 331, 337; 572 NW2d 201 (1998). A ruling on a motion for summary disposition is reviewed de novo. Id. at 118.

B. The public policy of the state of Michigan, as reflected in numerous legislative enactments, is one favoring life and proscribing elective abortions.

Without dispute, as recognized by both this Court and the Court of Appeals, the public policy of this state is one favoring life and proscribing elective abortions. See Doe v Dept of Social Services, 439 Mich 650, 682; 487 NW2d 166 (1992); Taylor v Kurapati, 236 Mich App 315, 347; 600 NW2d 670 (1999); Mahaffey v Attorney General, 222 Mich App 325, 337, 564 NW2d 104 (1997), lv den 456 Mich 948 (1998). In Roe v Wade, 410 US 113, 163; 93 S Ct 705; 35 L Ed 2d 147 (1973), the United States Supreme Court held that a state has an "important and legitimate interest in protecting the potentiality of human life." Several legislative enactments in Michigan clearly evidence the public policy of this state as one favoring and promoting life over abortion.

In 1997, the Michigan Legislature enacted MCL 400.109a prohibiting the appropriation of public funds for the purposes of providing abortion to welfare recipients unless necessary to save the mother's life (pertinent statutory provisions attached as Addendum A). In Doe v Dept of Social Services, supra at 694, this Court sustained the statute against a constitutional challenge based upon equal protection grounds. Applying the rational basis test, this Court concluded that the state had a legitimate interest in protecting life and promoting child birth over abortion.[3] Id. at 666-667.

Several statutory provisions in the public health code also clearly evidence this state's policy of favoring life over abortion. In MCL 333.17014 et seq., the Legislature adopted specific statutory guidelines regarding information that must be provided to a woman before an abortion is performed. In section 17014, the Legislature specifically set forth its resolve that childbirth in the state of Michigan is favored over abortion:

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[3] An similar federal interest was deemed appropriate by the United States Supreme court in Harris v McRae, 448 US 297; 100 S Ct 2671, 2692-2693; 65 L Ed 2d 784 (1980) wherein the Court held that Title XIX of the Social Security Act, and the 1976 Hyde Amendment which subsidizes medical expenses of indigent women who carry pregnancies to term and does not subsidize comparable expenses of women who undergo abortions does not violate equal protection guarantees as such incentives bear a direct relationship to legitimate congressional interest in protecting life.

> The legislature recognizes that under federal constitutional law, a state is permitted to enact persuasive measures that favor childbirth over abortion, even if those measures do not further a health interest.

Section 17014 further provides, in subsection (f), that the state of Michigan "has an interest in protecting women and, subject to the United States constitutional limitations and Supreme Court decisions, this state has an interest in protecting the fetus" (Addendum A). Among others, the Legislature has provided in MCL 333.17014(g) that a woman must be provided with medical, factual, and biological information about the fetus she is carrying to "safeguard the state's interests described" in MCL 333.17014(f). MCL 333.17015 precludes an abortion without the patient's informed written consent, given fully and without coercion. MCL 333.17016 and MCL 333.17516 preclude the performance of a partial-birth abortion unless necessary to save the life of the pregnant woman.

Further, the public health code has specific provisions reflecting this policy in enactments regarding allocation of funds to family planning services, and research, as well as providing immunity to those persons who refuse to perform an abortion. See MCL 333.1091 (allocations of funds through grants or contracts for education, other programs or services are governed by priority to those departments of community health who do not engage in performing or referring pregnant women for abortions); MCL 333.1072 (the state has a paramount interest in protecting all individuals and if an abortion results in the live birth of a newborn, the newborn is a legal person for all purposes under the law); MCL 333.2689 (a person shall not perform an abortion when part or all of the consideration for the performance is that the embryo or fetus may be used for research or study); MCL 333.2685 (nontherapeutic research shall not be performed on an embryo or fetus known by the person conducting the research to be the subject of a planned abortion being performed for any purpose other than to protect the life of a mother); MCL 333.9131 (in the context of family planning services provided by the local health department, clinical abortions are not considered a method of family planning); MCL 333.20181 (the health care professional who refuses to perform or participate in an abortion is afforded immunity from any criminal or civil liability or penalty).

The Legislature has also adopted an act requiring parental consent before an abortion is performed on a minor, MCL 722.903. Further, in MCL 380.1507, addressing sexual education in the schools, the Legislature has provided that clinical abortion shall not be considered a method of family planning "nor shall abortion be taught as a method of reproductive health." The Elliott-Larsen Civil Rights Act, MCL 37.2201, excludes from its definition of sex (in the context of sexual harassment claims) nontherapeutic abortion not intended to save the life of a mother. Advertisements relating to, among others, abortion are precluded in MCL 750.34 and 750.40. A cause of action based on a wrongful or negligent act against a pregnant woman resulting in a miscarriage or stillbirth has been provided in MCL 600.2922a.

Perhaps most telling, Michigan law makes it a criminal act to procure a miscarriage or perform an abortion of a child by a non-physician or after viability. MCL 750.14 and MCL 750.15. In People v Bricker, 389 Mich 524; 208 NW2d 172 (1973), this Court addressed the impact of the United States Supreme Court's decision in Roe v Wade, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973) on these criminal statutes and concluded that the prohibition against abortion would continue when performed by a non-physician or after viability of the fetus unless necessary to preserve the life or health of the mother.

Finally, in 2001, the Legislature made clear that the policy of this state is to preclude a civil action based on a claim that a child should not have been born. MCL 600.2971 provides that a person may not bring a civil action based on a claim that, but for an act or omission of the defendant, a child would not have been born.[4]

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[4] This case arose and was filed before the effective date of this statute.

C. The decisions by the appellate courts also reflect the public policy of this state favoring life by enforcing this state's abortion laws and by consistently narrowing the common law causes of action allowed in the area of birth torts.

As discussed above, in People v Bricker, supra, this Court held that the state of Michigan's penal code proscribed the defendant's conduct in performing an abortion where the defendant was not a licensed physician or where viability has been reached. 389 Mich at 527. Issuing its decision after the United States Supreme Court decision in Roe v Wade, supra, the Bricker Court stated that it was seeking to save what it could under Michigan's abortion penal statutes. The Bricker Court concluded that abortion is still prohibited in this state under certain circumstances, including when performed by a person not a licensed physician or after the fetus reaches viability.

> The central purpose of this legislation is clear enough – to prohibit all abortions except those required to preserve the health of the mother. The Supreme Court now requires other exceptions. They can properly be read into the statutes to preserve their constitutionality.
>
> The public policy of this state is a mandate upon us. Our duty to enforce that mandate is as clear as is our duty to comply with decisions of the United States Supreme Court construing the federal constitution.
>
> The public policy of this state is to be found in the declarations and deeds of its people. These find concrete expression in the Constitution adopted by the people, the laws enacted by the Legislature, the acts of the Governor, the Attorney General, others exercising executive power, the decisions of our courts, and the vote of the people. Proponents of abortion reform took a case to the people last November and lost.
>
> It is the public policy of the state to proscribe abortion. This public policy must now be subordinated to federal constitutional requirements.
>
> In light of the declared public policy of this state and the changed circumstances resulting from the federal constitutional doctrine elucidated in Roe and Doe, we construe s 14 of the penal code to mean that the prohibition of this section shall not apply to 'miscarriages' authorized by a pregnant woman's attending physician in the exercise of his medical judgment; the effectuation of the decision to abort is also left to the physician's judgment; however, a physician may not cause a miscarriage after viability except where necessary, in his medical judgment to preserve the life or health of the mother. [389 Mich at 529-530.]

Expressing awareness of the Bricker decision, the Court of Appeals in People v Higuera, 244 Mich App 429; 625 NW2d 444 (2001) stated that the Legislature intended to regulate those abortions permitted by Roe and "did not intend to repeal the general prohibition of abortions to the extent permitted by the federal constitution, as construed by the United States Supreme Court." 244 Mich App at 436-437. Noting that based on Supreme Court precedent, "the determination of viability is a matter for medical judgment", the Higuera court also recognized that "fetuses may now become viable long before a pregnancy reaches twenty-eight weeks." 244 Mich App at 442. In Mahaffey v Attorney General, supra, the Court of Appeals again concluded that based on the Bricker decision, there was no right to abortion under the Michigan constitution and that the declared public policy of the state of Michigan does not favor abortions. 222 Mich App at 336 & 337.

In Roe, supra, the United States Supreme Court stated that viability occurs when the fetus is potentially able to live outside the womb and that such can occur as early as 24 weeks. 410 US at 160. In Webster v Reproductive Health Services, 492 US 490; 109 S Ct 3040, 3055; 106 L Ed 2d 410 (1989), the Court stated that a fetus may be viable at 23 ½ to 24 weeks gestation, with a possible 4 week error in estimating gestational age. See also In Re Air Crash Disaster, 737 F Supp 427, 429 (ED Mich 1989), aff 917 F2d 24 (CA 6 1990); Toth v Goree, 65 Mich App 296; 237 NW2d 297 (1975). Generally, plaintiffs argue that viability is between 21 and 24 weeks. For purposes of this appeal only, using dates advanced by plaintiffs in the complaint, the fetus was approximately 23 ½ to 25 weeks in gestational age. Thus, legal abortion was not available in Michigan.

Subsequent to the Bricker and Roe decisions, the tort of wrongful life was rejected by the Michigan Court of Appeals in Eisbrenner v Stanley, 106 Mich App 357; 308 NW2d 209 (1981). The Court of Appeals refused to recognize a cause of action that essentially sought recovery based on a calculation of damages dependent upon life in an impaired state or nonexistence. Finding that such a comparison in the law was not one that should be made, the court found that a "wrongful life" cause of action could not be maintained on behalf of the child since the only alternative for the child was nonexistence due to abortion. In concluding that a cause of action for wrongful life was against

the public policy of this state, the Eisbrenner court noted that such an action would "demand a calculation of damages dependent upon a comparison between the Hobson's choice of life in an impaired state and nonexistence" and that such a comparison would be "impossible to make and juries should not be allowed to speculate" on such damages. 106 Mich App at 363 & 366.

The Court of Appeals also concluded in Rinard v Biczak, 177 Mich App 287; 441 NW2d 441 (1989), and Rouse v Wesley, 196 Mich App 624; 494 NW2d 7 (1992), lv den, 442 Mich 906 (1993) that Michigan law denies recovery of the costs of raising a normal, healthy child on public policy grounds, applying a conclusive presumption that the costs of raising a child are outweighed by the benefits of the child's life. In Rinard, supra, suit was brought for the alleged failure to diagnose a pregnancy. The plaintiff asserted that she would have chosen an abortion if she had been informed that she was pregnant. Rejecting the application of the "benefits rule" (weighing the benefits of having the child versus the costs of raising the child), the Rinard court held that recovery could not be had for the costs of raising a normal healthy child as an element of damages. In so concluding, the court noted that to allow the recovery of such costs would logically require "the conclusion that the non-existence of that child would be a benefit." Id. at 293.

> In a proper hierarchy of values, the benefit of life should not be outweighed by the expense of supporting it. A Court "has no business declaring that among the living are people who should have never been born." [Id at 293, quoting Proffitt, 51, quoting Smith v Cote, 128 NH 231, 249; 513 A2d 341, 353 (1986)].

Subsequently, in Rouse, supra, the Court of Appeals reviewed the damages recoverable where the plaintiff alleged a wrongful pregnancy action (negligence relating to sterilization or conception) and reaffirmed that the "benefits rule" should be rejected. The Rouse court noted that while it was not called upon to determine what recovery, if any, would be available to a party for raising a child who is not normal and healthy, the court highlighted that it was not "unsympathetic to the statement in Rinard that: "we question whether the benefits rule should ever be used when it requires that a value be placed on human life." Rouse, at 627, n 2, quoting Rinard, at 296.

In Taylor v Kurapati, 236 Mich App 315; 600 NW2d 670 (1999), the plaintiffs sought damages for the wrongful birth of their daughter, who was born with gross anatomical deformities. Id. at 320. The plaintiffs in Taylor alleged that an ultrasound taken during pregnancy should have shown the deformities. The Taylor plaintiffs claimed that the defendant's failure to inform the plaintiffs of these disabilities deprived them of the "right to make a reproductive decision regarding the pregnancy." Id. at 321. The plaintiffs also sought damages for the emotional distress in witnessing the birth of their child. Id.

As here, there was no claim by the plaintiffs in Taylor that the defendants' negligence caused the deformities, only that the parents would have terminated the pregnancy if they had known of the disability. The Taylor court held that the tort of wrongful birth "has no continued place in our jurisprudence." In discussing what is a "wrongful birth" action, the Taylor court noted that a wrongful birth tort "usually involves an allegation of a negligent failure relatively early in the pregnancy to inform the parents of the risk of birth defects" and allegations "that the baby involved should never have been born." Id. at 323.

In concluding that the "wrongful birth" tort would not continue in this state, the court in Taylor stated emphatically that "all human life is presumptively valuable." Id. at 334.

> We do *not* concede, however, that an intermediate appellate court of this state should implicitly endorse the view that the life of a disabled child is worth less than the life of a healthy child. If *all* life is presumptively valuable, how can we say that what we really mean is that all lives *except for the lives of the disabled* are presumptively valuable? [Id. at 335; citations omitted; emphasis in original.]

In rejecting an earlier decision in Proffitt v Bartolo, 162 Mich App 35; 412 NW2d 232 (1987) which recognized a "wrongful birth" cause of action, the Taylor court held that there is no duty to provide plaintiffs with information to enable them to decide whether to choose an abortion:

> Because the state has no obligation to affirmatively aid a woman in obtaining an elective abortion by paying for it, the state similarly has no obligation to take the affirmative step of imposing civil liability on a party for failing to provide a pregnant woman with information that would make her more likely to have an elective, and eugenic, abortion. [Taylor, supra at 348.]

The Taylor court recognized that the "right to privacy" recognized by the United States Supreme Court in Roe v Wade, supra, "implies no limitation on the authority of a state to make a value judgment favoring childbirth over abortion." 236 Mich App at 347, quoting Maher v Roe, 432 US 464; 473-474; 97 S Ct 2376; 53 L Ed 2d 484 (1977).

> In particular, Michigan law provides for no right to an abortion and, in fact, makes a value judgment favoring childbirth. This Court has held that the Michigan constitution does not provide a right to end a pregnancy. Mahaffey v Attorney General, 222 Mich App 325, 334-339; 564 NW2d 104 (1997). On the contrary, the public policy of Michigan, while limited by decisions of the United States Supreme Court, is to forbid elective abortion. *Id.* at 337, 564 NW2d 104. As dissenting Judge O'Connell noted in *Blair* [*v Hutzel Hospital*, 217 Mich App 502; 552 NW2d 507 (1996)] *supra* at 519, 552 NW2d 507, "Michigan refuses to publicly fund an abortion unless the abortion is necessary to save the life of the mother," citing *Doe v Dep't of Social Services*, 439 Mich 650, 678; 487 NW2d 166 (1992) and MCL 333.17014(f) and (h); MSA 14.15(17014)(f) and (h). [236 Mich App at 347.]

Other states have similarly refused to acknowledge and adopt a wrongful birth cause of action. See Atlanta Obstetrics and Gynecology Group v Abelson, 260 Ga 711; 398 SE2d 557 (1990); Azzolino v Dingfelder, 315 NC 103; 337 SE2d 528 (1985).

D. This State's interest and declared policy of favoring life over abortion should preclude recovery here.

A cause of action based on the alleged loss of a right to abort a child should not be recognized in this state. As stated by the United States Supreme Court in Harris, supra, "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." 100 S Ct at 2692. Claims of alleged negligence causing a delay in the decision to terminate a pregnancy, resulting in a more complicated abortion procedure, a procedure which in all likelihood is prohibited in Michigan under criminal law, should be precluded. As set forth by the numerous statutes and significant prior case law, this state has repeatedly reaffirmed its interests in favoring birth over abortion. This Court should not allow a party to recover damages based on their decision to secure an abortion. Such is directly contrary

both to the public policy repeatedly expressed by our Legislature and to the pronouncements of the appellate courts.

As Judge Murphy recognized in his dissent "the essence of plaintiffs' claim is that defendants failed to provide Mrs. Barnes with accurate and timely information that would have made her more likely to have an elective abortion" and that thus the majority is "essentially" recognizing "a cause of action for wrongful infliction of abortion" (Appendix p 92a). Judge Murphy further noted the contradiction in policy the majority's decision constituted:

> I find it to be contradiction to say in one breath that the policy of this state favors life and proscribes abortion, and in another breath rule that a party can recover civil damages through the Michigan legal system arising out of a choice to have an abortion, where no damages, in negligence actions, are recoverable for wrongful birth if the choice is to give birth. The majority opinion opens the door to lawsuits for damages associated with an elective abortion decision under not only circumstances that exist here, but situations where a woman conceives through the negligence of a defendant. If plaintiffs are permitted to pursue their action and recover damages, so can any other party who alleges a negligent act that led to the painful decision to terminate a pregnancy. The majority has necessarily embraced a new cause of action for wrongful infliction of abortion, or in other words, a cause of action for damages associated with the decision to undergo an abortion. [Appendix p 94a.]

Mrs. Barnes could have chosen to carry the baby to term and given birth. Under Taylor, her cause of action would clearly have been precluded. Where Mrs. Barnes chose to abort the child, such cause of action should also be precluded. Otherwise, plaintiffs will be allowed recovery where the choice is one of abortion versus the choice to give life. As Judge Murphy stated, the majority's decision essentially would allow a civil recovery for choosing an abortion over the choice of life:

> Plaintiffs' action is predicated on the claim that Mrs. Barnes was deprived of the opportunity to undergo a "regular" abortion procedure, as opposed to a late-term abortion procedure. However, Mrs. Barnes also had the opportunity and choice to carry the pregnancy to term and give birth. The majority opinion would allow her a civil recovery for choosing to terminate the pregnancy. This holding would necessarily allow any woman, who through an act of negligence is confronted with the decision to choose an abortion or choose birth, to recover damages for terminating the pregnancy. [Appendix p 94a.]

Noting that if plaintiff carried the child to term there would be no recovery, Judge Murphy expressed concern with requiring a jury to place a monetary value on the suffering incurred in undergoing a late-term abortion offset by any pain and suffering avoided by not giving birth to a potentially impaired child. Judge Murphy rightly believed that this will require the jury to "quantify the unquantifiable:"

> I am sympathetic with the suffering of plaintiffs in this case; however, recognition of a cause of action for wrongful infliction of an abortion is not sound in light of Michigan's public policy and this Court's decision in Taylor, which we are bound to follow. MCR 7.215(I). If Mrs. Barnes had decided not to terminate her pregnancy, she would have no right to seek recovery, under a negligence theory, for the mental anguish that she would have unquestionably felt after the birth. In allowing this case to proceed to trial, the jury will be required to place a monetary value on the suffering Mrs. Barnes experienced in undergoing the late-term abortion, but it will also be required, in assessing damages, to necessarily weigh and offset any pain and suffering that was avoided in not giving birth to a potentially impaired child. This will be asking the trier of fact in my opinion to quantify the unquantifiable, which is the reason that the wrongful birth tort and the accompanying benefits rule was rejected in our jurisprudence. Taylor, supra at 349. [Appendix p 95a.]

If the Court of Appeals decision is allowed to stand, the jury in this case and others, will be faced with numerous unseemly and speculative tasks. The jury will be required to compare the pain and distress with undergoing a late term abortion, off set by not given birth to a child with deficits. Such a determination will essentially require the jury to place a value on a human life. The jury will also be faced with what Justice Taylor described as the "arduous task" of delineating the pain and suffering associated with a "normal" abortion as such will need to be set off against the abortion procedure ultimately performed here (Appendix 95a, n. 5). Further, since under Taylor, plaintiffs would not have a cause of action if they chose to carry the pregnancy to term, the jury will have to weigh and determine the plaintiff's comparative negligence in proceeding with the abortion or plaintiffs' failure to mitigate damages by not seeking an abortion. See Shinholster v Oakwood, __ Mich __; 685 NW2d 275 (2004) (plaintiff's comparative negligence even if pretreatment must be considered by jury); Kirby v Larson, 400 Mich 585, 617-618; 256 NW2d 400 (1977) (plaintiff may not recover for enhanced damages that could have been avoided if plaintiff had used due care to

prevent or reduce damages subsequent to the injury complained of). Just as a determination of the value of life with deficits versus non-existence is not one that the law is equipped to make, so are the above damage comparisons ones which the law cannot and should not make.

As Judge Murphy recognized, the Court of Appeals has essentially declared in its opinion in this case that this state will recognize a cause of action for "wrongful infliction of abortion." The ramification of such a decision both on the law of this state and on medical care in this state are tremendous. Based on the Court of Appeals' decision, a woman who conceives a child because of negligence of a healthcare provider, such as in claims of improper sterilization, arguably can bring suit for damages incurred in securing an abortion. Similarly, if parents are not informed, before conception, of a possibility that their genetic make up could result in a child with a birth defect or even an undesirable characteristic, such parents could conceivably file suit based on securing an abortion after the child is conceived and after in utero testing reveals such birth defects or characteristics. Such actions are not beyond the scope of the Court of Appeals' decision. Such actions should not be recognized in this state.

In the context of a wrongful birth action in Azzolino supra, the North Caroline Supreme Court recognized the danger that lies in the types of characteristics that may be the basis of an abortion decision and the arduous duty facing such courts:

> [S]ince the parents will decide which "defects" would have led them to abort the fetus, other questions will rapidly arise in jurisdictions recognizing wrongful birth claims when determining whether such claims will be permitted in particular cases. When will parents in those jurisdictions be allowed to decide that their child is so "defective" that given a chance they would have aborted it while still a fetus and, as a result, then be allowed to hold their physician civilly liable? [337 SE2d at 535.]

As that court recognized, advances in medical science will increase the burden on the health profession as to what information to provide, both to the pregnant mother and to parents before conception:

> As medical science advances in its capability to detect genetic imperfections in a fetus, physicians in jurisdictions recognizing claims for wrongful birth will be forced to carry an increasingly heavy

> burden in determining what information is important to parents when attempting to obtain their informed consent for the fetus to be carried to term. Inevitably this will place increased pressure upon physicians to take the "safe" course by recommending abortion. [337 NE2d at 535.]

As Judge Murphy and the Court of Appeals in Taylor recognized, the state of Michigan "provides for no right to an abortion and, in fact, makes a value judgment favoring childbirth." 236 Mich App at 347. Further, as the Taylor court noted, "the public policy of Michigan, while limited by decisions of the United States Supreme Court, is to forbid elective abortions." Id. This policy should be applied here and extended to preclude claims where the damages sought include ones of abortion. Our Legislature has clearly set out in numerous statutory enactments its directive that the interests of this state is one which favors life over abortion.

If a tort for "wrongful infliction of abortion" should be allowed in this state, such is a decision for the Legislature. As stated by this Court in Sizemore v Smock, 430 Mich 283, 293; 422 NW2d 666 (1988), "the law cannot redress every injury, and the determination of where to draw the line of liability is essentially a question of policy." Noting that "[s]ocial policy must intervene at some point to limit the extent of one's liability", the Sizemore Court recognized that when such an extension of liability "involves a variety of complex social policy considerations" such determination should be deferred to legislative action. Here our Legislature has made its policy determination known. As such, this Court should not allow a cause of action which is directly against such policy.

E. The lower courts were bound by the Taylor v Kurapati case and should have granted summary disposition.

The lower courts should have followed and applied the Taylor decision. Although generically referred to in Taylor as a "wrongful birth" action, the holding by the Taylor court was not and, should not, be limited to only cases where a child is ultimately born. It is equally applicable where abortion is the claimed damage. Under MCR 7.215(C)(2) the decision in Taylor had precedential effect until declared otherwise by this Court. Plaintiffs did not assert before the Court of Appeals or the trial court that the Taylor case was not controlling law or even that Taylor was wrongly decided. Rather, plaintiffs simply asserted before the lower courts that the Taylor case is

distinguishable from the facts here because Mrs. Barnes chose to abort the child. Plaintiffs claimed they are not seeking damages for the cost of raising a child with deficiencies but rather damages related to the abortion procedure performed in Kansas, which Mrs. Barnes chose to have performed.

Although the plaintiffs here chose to terminate the pregnancy, while in Taylor the child was carried by the mother to term, the claim is essentially the same. Plaintiffs here alleged (as did the plaintiffs in Taylor) that the defendants were negligent in failing to provide information to them about the possibility of birth defects affecting and/or limiting their right to terminate the pregnancy. Thus, the claim is the same - - deprivation of the right to make a reproductive decision to terminate a pregnancy. All that is different is the alleged damages. In Taylor, the plaintiffs sought damages for the cost of raising a child with severe disabilities and for their emotional distress in witnessing the birth of the deformed child. Here, plaintiffs seek recovery for damages allegedly suffered by the late term abortion secured in Kansas. The "claim" presented is thus essentially identical to the claim presented in Taylor. The type of damages do not change the nature of a cause of action.

As with all negligence actions, plaintiffs must present a prima facie case of duty, breach of duty, proximate cause and damages. In a medical malpractice action the duty and breach element require a showing of what the standard of care requires and how the standard was breached. The standard of practice is that which a healthcare professional in the defendant's specialty or area of practice, with ordinary, average learning, judgment or skills usually would or would not do under the same or similar circumstances. MCL 600.2912a; Locke v Pachtman, 446 Mich 216, 222; 521 NW2d 786 (1994). Both in Taylor and in this case, the duty, breach and proximate cause elements are the same - the allegations both in Taylor and here are that information regarding possible birth deformities or defects should have been provided, that such information was not relayed timely, impacting on the parents' freedom to make a reproductive decision regarding termination of the pregnancy. The only difference between the cases are the damages alleged. The cause of actions are the same. The court in Taylor held that a claim based on an alleged failure to advise of possible

birth defects so as to affect a parent's reproductive decision (which defendants submit includes the decision to terminate the pregnancy) would no longer be recognized in this state.

Such is exactly the claim that the Barnes are pursuing. The motion for summary disposition filed by these defendants raised the issue of whether, by virtue of plaintiffs' decision to undergo a late term abortion procedure, plaintiffs were entitled to pursue a cause of action based upon an alleged delay in reporting possible birth defects - a cause of action which under Taylor would not have been actionable had they not elected to undergo the elective abortion. The lower courts were thus bound by Taylor until instructed otherwise by this Court.

F. If the plaintiffs are allowed to recover for an abortion procedure which this state has declared illegal they would improperly be allowed recovery for a wrongful act.

According to the complaint, plaintiffs seek damages due to the voluntary decision of Mrs. Barnes to secure an abortion at approximately the 24th or 25th week gestational age of the fetus. The abortion was performed in Kansas in late November of 1998. According to the complaint allegations, the fetus would have been approximately 23 ½ to 25 weeks in gestational age. Thus, the abortion secured by plaintiffs was prohibited under Michigan law. Essentially, plaintiffs are seeking to recover damages for an act that is illegal in the state of Michigan. This Court has held that it will not lend aid to a plaintiff whose cause of action is founded on illegal conduct. Orzel v Scott Drug Co, 449 Mich 550; 537 NW2d 208 (1995).

In Orzel, this Court held that under the common law, a plaintiff should not be allowed to maintain an action, based in whole or in part, on his own illegal conduct. 449 Mich at 558.

> The rationale that Michigan courts have used to support the wrongful-conduct rule are rooted in the public policy that courts should not lend their aid to a plaintiff who founded his cause of action on his own illegal conduct. If courts chose to regularly give their aid under such circumstances, several unacceptable consequences would result. First, by making relief potentially available for wrongdoers, courts in effect would condone and encourage illegal conduct. Second, some wrongdoers would be able to receive a profit or compensation as a result of their illegal acts. Third, and related to the two previously mentioned results, the public would view the legal system as a mockery of justice. Fourth, and finally, wrongdoers would be able to shift much of the responsibility for their illegal acts to other parties.

> [Id. at 559, quoting Glazier v Lee, 171 Mich App 216, 221; 429 NW2d 857 (1988); citations omitted.]

Recently, in the police chase case of Robinson v City of Detroit, 462 Mich 439; 613 NW2d 307 (2000), this Court reaffirmed its commitment to the principles behind the "wrong conduct rule." In Robinson, passengers in a stolen vehicle sued the city and police officers for injuries sustained in a crash during a police chase. This Court held that police officers giving chase owe a duty to innocent persons, but not to wrongdoers "whether the wrongdoer is the fleeing driver or a passenger." Id. At 451. Although the Court examined the claims against the police officers in the context of the governmental immunity statute, MCL 691.1407, and the statutes which place a duty upon police officers toward innocent persons when giving chase, MCL 257.603(3)(C) and MCL 257.632, the Court recognized that the "wrongful conduct rule" was also potentially applicable to preclude suit by a wrongdoer:

> One might even argue that these statutes create a duty toward a fleeing driver. We need not reach that question, but do note that, even if such a duty were found to exist, a fleeing driver would nevertheless be barred from seeking to recover for injuries sustained while attempting to evade a lawful order to stop his vehicle under Michigan's wrongful conduct rule. This rule is rooted in the public policy that courts should not lend their aid to plaintiffs whose cause of action is premised on their own illegal conduct. Culpable passengers have no greater claim to benefit from the wrongful conduct than does the driver. [462 Mich at 452, n 10.]

In this case, based on the complaint allegations, the fetus at the time of the abortion in Kansas would have been approximately 23 ½ to 25 weeks in gestational age. While viability is generally an issue for medical evidence, based on existent case law, viability can be reached at 23 to 24 weeks gestation, with a possible 4 week error in estimating gestational age. See Webster, supra. Thus, at the time the abortion was secured in Kansas, the fetus could have been viable. Under Michigan law, MCL 750.14 and MCL 750.15, it would have been a criminal act to procure an abortion in Michigan. While defendants believe that these criminal provisions also evidence the Legislature's intent to proscribe elective abortions, thus giving further basis for finding that there is no claim here, it is equally proper to dismiss plaintiffs' claim on the basis of the wrongful conduct rule.

The Court of Appeals majority declined to address this issue finding that it had not been raised below and, therefore, not preserved on appeal (Appendix p 91a). While this specific issue was not raised below, defendants submit that it can be reviewed and decided by this Court.[5]

Defendants sought summary disposition under a failure to state a claim. Assuming for purposes of argument only, that the facts and allegations stated in the complaint were true, viability of the fetus was potentially reached at the time of the abortion in Kansas. Plaintiffs have certainly never disputed this statement or advised the courts otherwise.

As discussed in the statement of facts, plaintiffs allege that the abortion was performed during the week of Thanksgiving, November 22 - 27, 1998 (Appendix p 7a, ¶¶34-35). Based on plaintiffs' allegations, the fetus would have been approximately 23 ½ to 25 weeks gestational age at the time of the abortion in Kansas (assuming arguendo for purposes of this appeal and the lower court motion only that the factual allegations asserted by plaintiffs in the complaint are true). This motion was brought under MCR 2.116(C)(8) and thus the legal sufficiency of the claim is tested on the pleadings alone. Based on the pleadings, plaintiffs have failed to state a claim as the wrongful conduct rule precludes recovery in this case.

The appellate courts can decide an issue even if not raised below when it is one of law for which all necessary facts are presented. In Meek v Wilson, 283 Mich 679, 689-690; 278 NW 731 (1938), this Court recognized the well established rule that where the record contains all of the facts necessary to the determination of the question raised, the issue may be considered even if not raised or passed upon in the court below. In Meek, the issue was whether a contract should be enforced where the contract was against public policy, in contravention of a statute's purposes and provisions. This Court decided to review the issue even though it had not been specifically raised below, stating:

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[5] The specific issue was not raised in the lower court briefs due in large part to the fact that the motion for summary disposition was filed shortly after the answer to the complaint on the basis of Taylor v Kurapati which defendants believed controlled this matter, requiring a dismissal.

> It would be anomalous, indeed, if this Court were required to enforce a contract which the record discloses to be against public policy and in contravention of the purposes and provisions of the statute. The rule that a contract against public policy is unenforceable is for the protection of the public at large, and this protection should not be lost because of the lack of diligence of a party to the suit. [Id. at 690.]

In Prudential Ins Co of America v Cusick, 369 Mich 269, 290; 120 NW2d 1 (1963), this Court also held that while generally a question may not be raised for the first time on appeal, such rule is not inflexible and that such a claim will be considered when it is necessary to a proper determination of a case. See also Heider v Michigan Sugar Co, 375 Mich 490, 506-507; 134 NW2d 637 (1965) (consideration of a claim sought to be raised for the first time on appeal may be considered where necessary to the proper determination of the case and this is especially true where an applicable statute has been overlooked).

In this case, based on the complaint allegations regarding the age of the fetus, and existing case law, it is clear that viability was indeed possible at the time the abortion was secured in Kansas. The abortion procedure performed here would have been illegal in the state of Michigan. Thus, the applicability of the wrongful conduct rule in this case is one of law and can be reviewed by this Court even though not specifically raised before the trial court. In the event that this Court finds that "viability" is not clear on the facts presented, this specific issue should be remanded to the trial court for determination.

Nonetheless, the illegality of the abortion procedure in the state of Michigan is clearly evidence of the intent of the Legislature, and the interest of this state, to protect and favor childbirth over abortion. In Robinson, supra, this Court did not need to find the wrongful conduct rule applicable to conclude that summary disposition should have been granted. The Court concluded that there was no duty to wrongdoers in a police chase case stating that "the police have no duty to a wrongdoer, whether the wrongdoer is the fleeing driver or a passenger." Here, plaintiffs wish to seek damages for pain, suffering, mental anguish and emotional distress which allegedly occurred

as a result of an abortion procedure elected by plaintiffs to be performed in the state of Kansas, which procedure was illegal in the state of Michigan. Such cause of action is directly contrary to and in contravention of the declared policy and interest of this state. Such recovery should be precluded.

G. Conclusion

The public policy of this state is one which favors life and discourages and proscribes elective abortions. This public interest is reflected in numerous legislative enactments, including penal code provisions precluding abortion after viability is reached by the fetus. The appellate courts of this state have consistently recognized and enforced such public policy. This Court should not now abandon this policy determination by the people of the state of Michigan, as reflected in the numerous statutory provisions, and allow a cause of action based on abortion as the element of damages or the wrongful infliction of abortion, especially when the injuries alleged were sustained in an abortion after the 2nd trimester, when viability may have been reached. The trial court and the Court of Appeals should have applied the clear and controlling ruling in Taylor v Kurapati, supra and dismissed with prejudice these defendants and the cause of action alleged in the complaint.

RELIEF REQUESTED

WHEREFORE, defendants, Ivana Vettraino, M.D., William Blessed, M.D. and Providence Hospital respectfully request that this Honorable Court reverse the Court of Appeals and the trial court and hold that summary disposition should have been granted and that these defendants and this case should be dismissed with prejudice. Defendants further request costs and attorney fees.

Respectfully submitted,

TANOURY, CORBET, SHAW, NAUTS & ESSAD

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ADDENDUM A

THE SOCIAL WELFARE ACT (EXCERPT)
Act 280 of 1939

400.109a Abortion as service provided with public funds to welfare recipient; prohibition; exception; policy.

Sec. 109a. Notwithstanding any other provision of this act, an abortion shall not be a service provided with public funds to a recipient of welfare benefits, whether through a program of medical assistance, general assistance, or categorical assistance or through any other type of public aid or assistance program, unless the abortion is necessary to save the life of the mother. It is the policy of this state to prohibit the appropriation of public funds for the purpose of providing an abortion to a person who receives welfare benefits unless the abortion is necessary to save the life of the mother.

This act shall take immediate effect.

History: Add. 1987, Act 59, Eff. Dec. 12, 1988.

Constitutionality: The Michigan Supreme Court considered an argument by plaintiffs in Doe v Department of Social Services, 439 Mich 650 (1992), that the state's refusal to pay for a therapeutic abortion violates the equal protection guarantee of the Michigan Constitution. Plaintiffs argued that S 400.109a provides unequal treatment to two classes of indigent, pregnant women — those who choose childbirth and those who chose abortion. The trial court in the case granted defendant's motion for summary disposition and dismissed the suit. The court of appeals reversed, 187 Mich App 493 (1991), concluding that (1) the equal protection guarantee in the Michigan Constitution provided greater protection than the corresponding guarantee in the federal constitution and (2) that the statute directly interferes with the women's right to an abortion. The Michigan Supreme Court reversed the court of appeals, holding that (1) there is no evidence of an intent in the Michigan Constitution to provide broader protection than its federal counterpart and (2) the state's decision to fund childbirth, but not abortion, does not impinge upon the exercise of a fundamental right. The Michigan Supreme Court, in upholding the validity of the statute under rational basis test, concluded that Michigan's Constitution permits the state to fund childbirth expenses even though it does not fund abortions.

Compiler's note: This added section was proposed by initiative petition pursuant to Const 1963, art 2, § 9. On June 17, 1987, the initiative petition was approved by an affirmative vote of the majority of the Senators elect and filed with the Secretary of State. On June 23, 1987, the initiative petition was approved by an affirmative vote of the majority of the Members elect of the House of Representatives and filed with the Secretary of State. The Legislature did not vote pursuant to Const 1963, art 4, § 27, to give immediate effect to this enactment.

In Frey v. Director, Department of Social Services, 162 Mich App 586; 413 NW2d 54 (1987), the Michigan Court of Appeals held that Const 1963, art 4, § 27, applies to initiative laws and that without the required two-thirds vote of each house of the Legislature, as provided by Const 1963, art 4, § 27, Act 59 of 1987 could not take effect until the expiration of 90 days from the end of the session at which it was passed.

In affirming the decision of the Court of Appeals in Frey, the Michigan Supreme Court held that when a law is proposed by initiative and enacted by the Legislature without change or amendment within forty days as required by Const 1963, art 2, § 9, it takes effect ninety days after the end of the session in which it was passed unless two-thirds of the members of each house of the Legislature, as provided by art 4, § 27, vote to give the law immediate effect. Act 59 of 1987, not having received votes in favor of immediate effect by two-thirds of the elected members of each house, may not take effect until ninety days after the end of the session in which it was enacted. Frey v. Director, Department of Social Services, 429 Mich 315; 414 NW2d 873 (1987).

On March 1, 1988, petitions to invoke the power of referendum with regard to Act 59 of 1987 were filed with the Secretary of State. On April 13, 1988, the Board of State Canvassers certified the validity of a sufficient number of petition signatures to invoke the referendum. In a letter opinion to C. Patrick Babcock, Director, Department of Social Services, dated March 28, 1988, the Attorney General addressed the following question: "[I]f the filing of petitions, which include, if they are valid, a sufficient number of signatures to properly invoke a referendum, stays the effective date of Act 59 of 1987, which will otherwise become effective on March 30, 1988?" The Attorney General concluded that "when a petition seeking referendum, which on its face meets legal requirements, is filed the signatures appearing on that petition are presumed valid and the statute at issue is stayed or suspended until either the petitions are found to be invalid or a vote of the people occurs."

Act 59 of 1987, as enacted by the Legislature, was submitted to the people by referendum petition and approved by a majority of the votes cast at the general election held November 8, 1988. The Board of State Canvassers officially declared the vote to be 1,959,727 (for) and 1,486,371 (against) on December 2, 1988.

Popular name: Act 280

PUBLIC HEALTH CODE (EXCERPT)
Act 368 of 1978

333.17014 Legislative findings.

Sec. 17014. The legislature recognizes that under federal constitutional law, a state is permitted to enact persuasive measures that favor childbirth over abortion, even if those measures do not further a health interest. Sections 17015 and 17515 are nevertheless designed to provide objective, truthful information, and are not intended to be persuasive. The legislature finds that the enactment of sections 17015 and 17515 is essential for all of the following reasons:

(a) The knowledgeable exercise of a woman's decision to have an abortion depends on the extent to which the woman receives sufficient information to make an informed choice regarding abortion.

(b) The decision to obtain an abortion is an important and often stressful one, and it is in the state's interest that the decision be made with full knowledge of its nature and consequences.

(c) Enactment of sections 17015 and 17515 is necessary to ensure that, before an abortion, a woman is provided information regarding her available alternatives, and to ensure that a woman gives her voluntary and informed consent to an abortion.

(d) The receipt of accurate information about abortion and its alternatives is essential to the physical and psychological well-being of a woman considering an abortion.

(e) Because many abortions in this state are performed in clinics devoted solely to providing abortions, women who seek abortions at these clinics normally do not have a prior patient-physician relationship with the physician performing the abortion nor do these women continue a patient-physician relationship with the physician after the abortion. In many instances, the woman's only actual contact with the physician performing the abortion occurs simultaneously with the abortion procedure, with little opportunity to receive counsel concerning her decision. Consequently, certain safeguards are necessary to protect a woman's opportunity to select the option best suited to her particular situation.

(f) This state has an interest in protecting women and, subject to United States constitutional limitations and supreme court decisions, this state has an interest in protecting the fetus.

(g) Providing a woman with factual, medical, and biological information about the fetus she is carrying is essential to safeguard the state's interests described in subdivision (f). The dissemination of the information set forth in sections 17015 and 17515 is necessary due to the irreversible nature of the act of abortion and the often stressful circumstances under which the abortion decision is made.

(h) Because abortion services are marketed like many other commercial enterprises, and nearly all abortion providers advertise some free services, including pregnancy tests and counseling, the legislature finds that consumer protection should be extended to women contemplating an abortion decision by delaying any financial transactions until after a 24-hour waiting period. Furthermore, since the legislature and abortion providers have determined that a woman's right to give informed consent to an abortion can be protected by means other than the patient having to travel to the abortion facility during the 24-hour waiting period, the legislature finds that abortion providers do not have a legitimate claim of necessity in obtaining payments during the 24-hour waiting period.

(i) The safeguards that will best protect a woman seeking advice concerning abortion include the following:

(*i*) Private, individual counseling, including dissemination of certain information, as the woman's individual circumstances dictate, that affect her decision of whether to choose an abortion.

(*ii*) A 24-hour waiting period between a woman's receipt of that information provided to assist her in making an informed decision, and the actual performance of an abortion, if she elects to undergo an abortion. A 24-hour waiting period affords a woman, in light of the information provided by the physician or a qualified person assisting the physician, an opportunity to reflect on her decision and to seek counsel of family and friends in making her decision.

(j) The safeguards identified in subdivision (i) advance a woman's interests in the exercise of her discretion to choose or not to choose an abortion, and are justified by the objectives and interests of this state to protect the health of a pregnant woman and, subject to United States constitutional limitations and supreme court decisions, to protect the fetus.

History: Add. 1993, Act 133, Eff. Apr. 1, 1994;—Am. 2002, Act 685, Eff. Mar. 31, 2003.

PUBLIC HEALTH CODE (EXCERPT)
Act 368 of 1978

333.17015 Informed consent; definitions; duties of physician or assistant; location; disclosure of information; website maintained and operated by department; medical emergency necessitating abortion; duties of department; physician's duty to inform patient; validity of consent or certification form; right to abortion not created; prohibition; portion of act found invalid; duties of local health department; confidentiality.

Sec. 17015. (1) Subject to subsection (10), a physician shall not perform an abortion otherwise permitted by law without the patient's informed written consent, given freely and without coercion.

(2) For purposes of this section:

(a) "Abortion" means the intentional use of an instrument, drug, or other substance or device to terminate a woman's pregnancy for a purpose other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus. Abortion does not include the use or prescription of a drug or device intended as a contraceptive.

(b) "Fetus" means an individual organism of the species homo sapiens in utero.

(c) "Local health department representative" means a person employed by, or under contract to provide services on behalf of, a local health department who meets 1 or more of the licensing requirements listed in subdivision (f).

(d) "Medical emergency" means that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

(e) "Medical service" means the provision of a treatment, procedure, medication, examination, diagnostic test, assessment, or counseling, including, but not limited to, a pregnancy test, ultrasound, pelvic examination, or an abortion.

(f) "Qualified person assisting the physician" means another physician or a physician's assistant licensed under this part or part 175, a fully licensed or limited licensed psychologist licensed under part 182, a professional counselor licensed under part 181, a registered professional nurse or a licensed practical nurse licensed under part 172, or a social worker registered under part 185.

(g) "Probable gestational age of the fetus" means the gestational age of the fetus at the time an abortion is planned to be performed.

(h) "Provide the patient with a physical copy" means confirming that the patient accessed the internet website described in subsection (5) and received a printed valid confirmation form from the website and including that form in the patient's medical record or giving a patient a copy of a required document by 1 or more of the following means:

(*i*) In person.

(*ii*) By registered mail, return receipt requested.

(*iii*) By parcel delivery service that requires the recipient to provide a signature in order to receive delivery of a parcel.

(*iv*) By facsimile transmission.

(3) Subject to subsection (10), a physician or a qualified person assisting the physician shall do all of the following not less than 24 hours before that physician performs an abortion upon a patient who is a pregnant woman:

(a) Confirm that, according to the best medical judgment of a physician, the patient is pregnant, and determine the probable gestational age of the fetus.

(b) Orally describe, in language designed to be understood by the patient, taking into account her age, level of maturity, and intellectual capability, each of the following:

(*i*) The probable gestational age of the fetus she is carrying.

(*ii*) Information about what to do and whom to contact should medical complications arise from the abortion.

(*iii*) Information about how to obtain pregnancy prevention information through the department of community health.

(c) Provide the patient with a physical copy of the written summary described in subsection (11)(b) that corresponds to the procedure the patient will undergo and is provided by the department of community health. If the procedure has not been recognized by the department, but is otherwise allowed under Michigan law, and the department has not provided a written summary for that procedure, the physician shall develop and provide a written summary that describes the procedure, any known risks or complications of the procedure, and risks associated with live birth and meets the requirements of subsection (11)(b)(*iii*) through (*vii*).

(d) Provide the patient with a physical copy of a medically accurate depiction, illustration, or photograph and description of a fetus supplied by the department of community health pursuant to subsection (11)(a) at the gestational age nearest the probable gestational age of the patient's fetus.

(e) Provide the patient with a physical copy of the prenatal care and parenting information pamphlet distributed by the department of community health under section 9161.

(4) The requirements of subsection (3) may be fulfilled by the physician or a qualified person assisting the physician at a location other than the health facility where the abortion is to be performed. The requirement of subsection (3)(a) that a patient's pregnancy be confirmed may be fulfilled by a local health department under subsection (18). The requirements of subsection (3) cannot be fulfilled by the patient accessing an internet website other than the internet website described in subsection (5) that is maintained through the department.

(5) The requirements of subsection (3)(c) through (e) may be fulfilled by a patient accessing the internet website maintained and operated through the department and receiving a printed, valid confirmation form from the website that the patient has reviewed the information required in subsection (3)(c) through (e) at least 24 hours before an abortion being performed on the patient. The website shall not require any information be supplied by the patient. The department shall not track, compile, or otherwise keep a record of information that would identify a patient who accesses this website. The patient shall supply the valid confirmation form to the physician or qualified person assisting the physician to be included in the patient's medical record to comply with this subsection.

(6) Subject to subsection (10), before obtaining the patient's signature on the acknowledgment and consent form, a physician personally and in the presence of the patient shall do all of the following:

(a) Provide the patient with the physician's name and inform the patient of her right to withhold or withdraw her consent to the abortion at any time before performance of the abortion.

(b) Orally describe, in language designed to be understood by the patient, taking into account her age, level of maturity, and intellectual capability, each of the following:

(*i*) The specific risk, if any, to the patient of the complications that have been associated with the procedure the patient will undergo, based on the patient's particular medical condition and history as determined by the physician.

(*ii*) The specific risk of complications, if any, to the patient if she chooses to continue the pregnancy based on the patient's particular medical condition and history as determined by a physician.

(7) To protect a patient's privacy, the information set forth in subsection (3) and subsection (6) shall not be disclosed to the patient in the presence of another patient.

(8) Before performing an abortion on a patient who is a pregnant woman, a physician or a qualified person assisting the physician shall do all of the following:

(a) Obtain the patient's signature on the acknowledgment and consent form described in subsection (11)(c) confirming that she has received the information required under subsection (3).

(b) Provide the patient with a physical copy of the signed acknowledgment and consent form described in subsection (11)(c).

(c) Retain a copy of the signed acknowledgment and consent form described in subsection (11)(c) and, if applicable, a copy of the pregnancy certification form completed under subsection (18)(b), in the patient's medical record.

(9) This subsection does not prohibit notifying the patient that payment for medical services will be required or that collection of payment in full for all medical services provided or planned may be demanded after the 24-hour period described in this subsection has expired. A physician or an agent of the physician shall not collect payment, in whole or in part, for a medical service provided to or planned for a patient before the expiration of 24 hours from the time the patient has done either or both of the following, except in the case of a physician or an agent of a physician receiving capitated payments or under a salary arrangement for providing those medical services:

(a) Inquired about obtaining an abortion after her pregnancy is confirmed and she has received from that physician or a qualified person assisting the physician the information required under subsection (3)(c) and (d).

(b) Scheduled an abortion to be performed by that physician.

(10) If the attending physician, utilizing his or her experience, judgment, and professional competence, determines that a medical emergency exists and necessitates performance of an abortion before the requirements of

subsections (1), (3), and (6) can be met, the physician is exempt from the requirements of subsections (1), (3), and (6), may perform the abortion, and shall maintain a written record identifying with specificity the medical factors upon which the determination of the medical emergency is based.

(11) The department of community health shall do each of the following:

(a) Produce medically accurate depictions, illustrations, or photographs of the development of a human fetus that indicate by scale the actual size of the fetus at 2-week intervals from the fourth week through the twenty-eighth week of gestation. Each depiction, illustration, or photograph shall be accompanied by a printed description, in nontechnical English, Arabic, and Spanish, of the probable anatomical and physiological characteristics of the fetus at that particular state of gestational development.

(b) Subject to subdivision (g), develop, draft, and print, in nontechnical English, Arabic, and Spanish, written standardized summaries, based upon the various medical procedures used to abort pregnancies, that do each of the following:

(*i*) Describe, individually and on separate documents, those medical procedures used to perform abortions in this state that are recognized by the department.

(*ii*) Identify the physical complications that have been associated with each procedure described in subparagraph (*i*) and with live birth, as determined by the department. In identifying these complications, the department shall consider the annual statistical report required under section 2835(6), and shall consider studies concerning complications that have been published in a peer review medical journal, with particular attention paid to the design of the study, and shall consult with the federal centers for disease control, the American college of obstetricians and gynecologists, the Michigan state medical society, or any other source that the department determines appropriate for the purpose.

(*iii*) State that as the result of an abortion, some women may experience depression, feelings of guilt, sleep disturbance, loss of interest in work or sex, or anger, and that if these symptoms occur and are intense or persistent, professional help is recommended.

(*iv*) State that not all of the complications listed in subparagraph (*ii*) may pertain to that particular patient and refer the patient to her physician for more personalized information.

(*v*) Identify services available through public agencies to assist the patient during her pregnancy and after the birth of her child, should she choose to give birth and maintain custody of her child.

(*vi*) Identify services available through public agencies to assist the patient in placing her child in an adoptive or foster home, should she choose to give birth but not maintain custody of her child.

(*vii*) Identify services available through public agencies to assist the patient and provide counseling should she experience subsequent adverse psychological effects from the abortion.

(c) Develop, draft, and print, in nontechnical English, Arabic, and Spanish, an acknowledgment and consent form that includes only the following language above a signature line for the patient:

"I, _____, hereby authorize Dr. _____ ("the physician") and any assistant designated by the physician to perform upon me the following operation(s) or procedure(s):

_____

(Name of operation(s) or procedure(s))

_____

I understand that I am approximately _____ weeks pregnant. I consent to an abortion procedure to terminate my pregnancy. I understand that I have the right to withdraw my consent to the abortion procedure at any time prior to performance of that procedure. I acknowledge that at least 24 hours before the scheduled abortion I have received a physical copy of each of the following:

(a) A medically accurate depiction, illustration, or photograph of a fetus at the probable gestational age of the fetus I am carrying.

(b) A written description of the medical procedure that will be used to perform the abortion.

(c) A prenatal care and parenting information pamphlet. If any of the above listed documents were transmitted by facsimile, I certify that the documents were clear and legible. I acknowledge that the physician who will perform the abortion has orally described all of the following to me:

(*i*) The specific risk to me, if any, of the complications that have been associated with the procedure I am scheduled to undergo.

(*ii*) The specific risk to me, if any, of the complications if I choose to continue the pregnancy.

I acknowledge that I have received all of the following information:

(d) Information about what to do and whom to contact in the event that complications arise from the abortion.

(e) Information pertaining to available pregnancy related services.

I have been given an opportunity to ask questions about the operation(s) or procedure(s). I certify that I have not been required to make any payments for an abortion or any medical service before the expiration of 24 hours after I received the written materials listed in paragraphs (a), (b), and (c) above, or 24 hours after the time and date listed on the confirmation form if paragraphs (a), (b), and (c) were viewed from the state of Michigan internet website.".

(d) Make available to physicians through the Michigan board of medicine and the Michigan board of osteopathic medicine and surgery, and any person upon request the copies of medically accurate depictions, illustrations, or photographs described in subdivision (a), the standardized written summaries described in subdivision (b), the acknowledgment and consent form described in subdivision (c), the prenatal care and parenting information pamphlet described in section 9161, and the pregnancy certification form described in subdivision (f).

(e) The department shall not develop written summaries for abortion procedures under subdivision (b) that utilize medication that has not been approved by the United States food and drug administration for use in performing an abortion.

(f) Develop, draft, and print a certification form to be signed by a local health department representative at the time and place a patient has a pregnancy confirmed, as requested by the patient, verifying the date and time the pregnancy is confirmed.

(g) Develop and maintain an internet website that allows a patient considering an abortion to review the information required in subsection (3)(c) through (e). After the patient reviews the required information, the department shall assure that a confirmation form can be printed by the patient from the internet website that will verify the time and date the information was reviewed. A confirmation form printed under this subdivision becomes invalid 14 days after the date and time printed on the confirmation form.

(12) A physician's duty to inform the patient under this section does not require disclosure of information beyond what a reasonably well-qualified physician licensed under this article would possess.

(13) A written consent form meeting the requirements set forth in this section and signed by the patient is presumed valid. The presumption created by this subsection may be rebutted by evidence that establishes, by a preponderance of the evidence, that consent was obtained through fraud, negligence, deception, misrepresentation, coercion, or duress.

(14) A completed certification form described in subsection (11)(f) that is signed by a local health department representative is presumed valid. The presumption created by this subsection may be rebutted by evidence that establishes, by a preponderance of the evidence, that the physician who relied upon the certification had actual knowledge that the certificate contained a false or misleading statement or signature.

(15) This section does not create a right to abortion.

(16) Notwithstanding any other provision of this section, a person shall not perform an abortion that is prohibited by law.

(17) If any portion of this act or the application of this act to any person or circumstances is found invalid by a court, that invalidity does not affect the remaining portions or applications of the act that can be given effect without the invalid portion or application, if those remaining portions are not determined by the court to be inoperable.

(18) Upon a patient's request, each local health department shall:

(a) Provide a pregnancy test for that patient to confirm the pregnancy as required under subsection (3)(a) and determine the probable gestational stage of the fetus. The local health department need not comply with this subdivision if the requirements of subsection (3)(a) have already been met.

(b) If a pregnancy is confirmed, ensure that the patient is provided with a completed pregnancy certification form described in subsection (11)(f) at the time the information is provided.

(19) The identity and address of a patient who is provided information or who consents to an abortion pursuant to this section is confidential and is subject to disclosure only with the consent of the patient or by judicial process.

(20) A local health department with a file containing the identity and address of a patient described in subsection (19) who has been assisted by the local health department under this section shall do both of the following:

(a) Only release the identity and address of the patient to a physician or qualified person assisting the physician in order to verify the receipt of the information required under this section.

(b) Destroy the information containing the identity and address of the patient within 30 days after assisting the patient under this section.

History: Add. 1993, Act 133, Eff. Apr. 1, 1994;—Am. 2000, Act 345, Eff. Mar. 28, 2001;—Am. 2002, Act 685, Eff. Mar. 31, 2003.

Popular name: Act 368

Popular name: Informed Consent

PUBLIC HEALTH CODE (EXCERPT)
Act 368 of 1978

333.17016 Performance of partial-birth abortion prohibited.

Sec. 17016. (1) Except as otherwise provided in subsection (2), a physician or an individual performing an act, task, or function under the delegatory authority of a physician shall not perform a partial-birth abortion, even if the abortion is otherwise permitted by law.

(2) A physician or an individual described in subsection (1) may perform a partial-birth abortion if the physician or other individual reasonably believes that performing the partial-birth abortion is necessary to save the life of a pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury and that no other medical procedure will accomplish that purpose.

(3) This section does not create a right to abortion.

(4) Notwithstanding any other provision of this section, a person shall not perform an abortion that is prohibited by law.

(5) As used in this section:

(a) "Abortion" means the intentional use of an instrument, drug, or other substance or device to terminate a woman's pregnancy for a purpose other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus. Abortion does not include a procedure to complete a spontaneous abortion or the use or prescription of a drug or device intended as a contraceptive.

(b) "Fetus" means an individual organism of the species homo sapiens at any time before complete delivery from a pregnant woman.

(c) "Partial-birth abortion" means an abortion in which the physician or individual acting under the delegatory authority of the physician performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery.

History: Add. 1996, Act 273, Eff. Mar. 31, 1997.

Popular name: Act 368

PUBLIC HEALTH CODE (EXCERPT)
Act 368 of 1978

333.17516 Performance of partial-birth abortion prohibited.

Sec. 17516. (1) Except as otherwise provided in subsection (2), a physician or an individual performing an act, task, or function under the delegatory authority of a physician shall not perform a partial-birth abortion, even if the abortion is otherwise permitted by law.

(2) A physician or an individual described in subsection (1) may perform a partial-birth abortion if the physician or other individual reasonably believes that performing the partial-birth abortion is necessary to save the life of a pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury and that no other medical procedure will accomplish that purpose.

(3) This section does not create a right to abortion.

(4) Notwithstanding any other provision of this section, a person shall not perform an abortion that is prohibited by law.

(5) As used in this section:

(a) "Abortion" means the intentional use of an instrument, drug, or other substance or device to terminate a woman's pregnancy for a purpose other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus. Abortion does not include a procedure to complete a spontaneous abortion or the use or prescription of a drug or device intended as a contraceptive.

(b) "Fetus" means an individual organism of the species homo sapiens at any time before complete delivery from a pregnant woman.

(c) "Partial-birth abortion" means an abortion in which the physician or individual acting under the delegatory authority of the physician performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery.

History: Add. 1996, Act 273, Eff. Mar. 31, 1997.

Popular name: Act 368

ALLOCATION OF FUNDS TO FAMILY PLANNING SERVICES (EXCERPT)
Act 360 of 2002

333.1091 Family planning or reproductive services; allocation of funds.

Sec. 1. (1) Except as otherwise provided in this section, it is the policy of this state for the department of community health to give priority under this subsection in the allocation of funds through grants or contracts for educational and other programs and services administered by the department of community health and primarily pertaining to family planning or reproductive health services, or both. This subsection applies to grants or contracts awarded to a qualified entity that does not engage in 1 or more of the following activities:

(a) Performing elective abortions or allowing the performance of elective abortions within a facility owned or operated by the qualified entity.

(b) Referring a pregnant woman to an abortion provider for an elective abortion.

(c) Adopting or maintaining a policy in writing that elective abortion is considered part of a continuum of family planning or reproductive health services, or both.

(2) If each of the entities applying for a grant or contract described in subsection (1) engages in 1 or more of the activities listed in subsection (1)(a) to (c), the department of community health shall give priority to those entities that engage in the least number of activities listed in subsection (1)(a) to (c).

(3) Subsection (1) does not apply if the only applying entity for a grant or contract described in subsection (1) engages in 1 or more of the activities listed in subsection (1)(a) to (c).

(4) Subsection (1) does not apply to grants or contracts awarded by the department of community health other than family planning and pregnancy prevention awards under subpart a of part 59 of title 42 of the Code of Federal Regulations or state appropriated family planning or pregnancy prevention funds.

(5) In applying the priority established in subsection (1), the department of community health shall not take into consideration an activity listed in subsection (1)(a) to (c) if participating in that activity is required under federal law as a qualification for receiving federal funding.

(6) If an entity applying for a contract or grant described in subsection (1) is affiliated with another entity that engages in 1 or more of the activities listed in subsection (1)(a) to (c), the applying entity shall, for purposes of awarding a grant or contract under subsection (1), be considered independent of the affiliated entity if all of the following conditions are met:

(a) The physical properties and equipment of the applying entity are separate and not shared with the affiliated entity.

(b) The financial records of the applying entity and affiliated entity demonstrate that the affiliated entity receives no funds from the applying entity.

(c) The paid personnel of the applying entity do not perform any function or duty on behalf of the affiliated entity while on the physical property of the applying entity or during the hours the personnel are being paid by the applying entity.

(7) The department of community health shall award grants and contracts to qualified entities under this act to ensure that family planning services are adequately available and distributed in a manner that is reflective of the geographic and population diversity of this state. A qualified entity that is awarded a grant or contract must also be capable of serving the patient census reflected in the contract or grant for which the qualified entity is applying.

(8) As used in this act:

(a) "Affiliated" means the sharing between entities of 1 or more of the following:

(*i*) A common name or other identifier.

(*ii*) Members of a governing board.

(*iii*) A director.

(*iv*) Paid personnel.

(b) "Elective abortion" means the performance of a procedure involving the intentional use of an instrument, drug, or other substance or device to terminate a woman's pregnancy for a purpose other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus. Elective abortion does not include either of the following:

(*i*) The use or prescription of a drug or device intended as a contraceptive.

(*ii*) The intentional use of an instrument, drug, or other substance or device by a physician to terminate a woman's pregnancy if the woman's physical condition, in the physician's reasonable medical judgment, necessitates the termination of the woman's pregnancy to avert her death.

(c) "Entity" means a local agency, organization, or corporation or a subdivision, contractee, subcontractee, or grant recipient of a local agency, organization, or corporation.

(d) "Qualified entity" means an entity reviewed and determined by the department of community health to be technically and logistically capable of providing the quality and quantity of services required within a cost range considered appropriate by the department.

History: 2002, Act 360, Eff. Mar. 31, 2003.

BORN ALIVE INFANT PROTECTION ACT (EXCERPT)
Act 687 of 2002

333.1072 Legislative findings.

Sec. 2. The legislature finds all of the following:

(a) The state has a paramount interest in protecting all individuals.

(b) If an abortion results in the live birth of a newborn, the newborn is a legal person for all purposes under the law.

(c) A woman's right to terminate pregnancy ends when the pregnancy is terminated. It is not an infringement on a woman's right to terminate her pregnancy for the state to assert its interest in protecting a newborn whose live birth occurs as the result of an abortion.

History: 2002, Act 687, Eff. Mar. 31, 2003.

PUBLIC HEALTH CODE (EXCERPT)
Act 368 of 1978

333.2689 Abortion; consideration.

Sec. 2689. A person shall not perform or offer to perform an abortion where part or all of the consideration for the performance is that the embryo, or fetus, whether alive or dead, may be used for research or study.

History: 1978, Act 368, Eff. Sept. 30, 1978.

Popular name: Act 368

PUBLIC HEALTH CODE (EXCERPT)
Act 368 of 1978

333.2685 Use of live human embryo, fetus, or neonate for nontherapeutic research; prohibitions; presumption.

Sec. 2685. (1) A person shall not use a live human embryo, fetus, or neonate for nontherapeutic research if, in the best judgment of the person conducting the research, based upon the available knowledge or information at the approximate time of the research, the research substantially jeopardizes the life or health of the embryo, fetus, or neonate. Nontherapeutic research shall not in any case be performed on an embryo or fetus known by the person conducting the research to be the subject of a planned abortion being performed for any purpose other than to protect the life of the mother.

(2) For purposes of subsection (1) the embryo or fetus shall be conclusively presumed not to be the subject of a planned abortion if the mother signed a written statement at the time of the research, that she was not planning an abortion.

History: 1978, Act 368, Eff. Sept. 30, 1978.

Popular name: Act 368

PUBLIC HEALTH CODE (EXCERPT)
Act 368 of 1978

333.9131 Family planning services; publicity; request by medically indigent individual; clinical abortions.

Sec. 9131. (1) The department, and under its supervision a local health department, shall publicize the places where family planning services are available. The publicity shall state that receipt of public health services is not dependent on a request or nonrequest for family planning services.

(2) An effort shall not be made to coerce a medically indigent individual to request or not request family planning services. The department, and under its supervision a local health department, shall provide family planning services to a medically indigent individual upon the individual's request in accordance with standards established under section 9133. Clinical abortions shall not be considered a method of family planning.

History: 1978, Act 368, Eff. Sept. 30, 1978.

Popular name: Act 368

PUBLIC HEALTH CODE (EXCERPT)
Act 368 of 1978

333.20181 Abortion; admitting patient not required; refusal to perform, participate in, or allow; immunity.

Sec. 20181. A hospital, clinic, institution, teaching institution, or other health facility is not required to admit a patient for the purpose of performing an abortion. A hospital, clinic, institution, teaching institution, or other health facility or a physician, member, or associate of the staff, or other person connected therewith, may refuse to perform, participate in, or allow to be performed on its premises an abortion. The refusal shall be with immunity from any civil or criminal liability or penalty.

History: 1978, Act 368, Eff. Sept. 30, 1978.

Popular name: Act 368

THE PARENTAL RIGHTS RESTORATION ACT (EXCERPT)
Act 211 of 1990

722.903 Consent to abortion on minor; petition for waiver of parental consent.

Section 3. (1) Except as otherwise provided in this act, a person shall not perform an abortion on a minor without first obtaining the written consent of the minor and 1 of the parents or the legal guardian of the minor.

(2) If a parent or the legal guardian is not available or refuses to give his or her consent, or if the minor elects not to seek consent of a parent or the legal guardian, the minor may petition the probate court pursuant to section 4 for a waiver of the parental consent requirement of this section.

History: 1990, Act 211, Eff. Mar. 28, 1991.

Popular name: Parental Consent Law

THE REVISED SCHOOL CODE (EXCERPT)
Act 451 of 1976

380.1507 Instruction in sex education; instructors, facilities, and equipment; stressing abstinence from sex; elective class; notice to parent or guardian; request to excuse pupil from attendance; qualifications of teacher; sex education advisory board; public hearing; distribution of family planning drug or device prohibited; "family planning," "class," and "course" defined.

Sec. 1507. (1) The board of a school district may engage qualified instructors and provide facilities and equipment for instruction in sex education, including family planning, human sexuality, and the emotional, physical, psychological, hygienic, economic, and social aspects of family life. Instruction may also include the subjects of reproductive health and the recognition, prevention, and treatment of sexually transmitted disease. Subject to subsection (7) and section 1507b, the instruction described in this subsection shall stress that abstinence from sex is a responsible and effective method of preventing unplanned or out-of-wedlock pregnancy and sexually transmitted disease and is a positive lifestyle for unmarried young people.

(2) The class described in subsection (1) shall be elective and not a requirement for graduation.

(3) A pupil shall not be enrolled in a class in which the subjects of family planning or reproductive health are discussed unless the pupil's parent or guardian is notified in advance of the course and the content of the course, is given a prior opportunity to review the materials to be used in the course and is notified in advance of his or her right to have the pupil excused from the class. The state board shall determine the form and content of the notice required in this subsection.

(4) Upon the written request of a pupil or the pupil's parent or legal guardian, a pupil shall be excused, without penalty or loss of academic credit, from attending a class described in subsection (1).

(5) A school district that provides a class as permitted by subsection (1) shall offer the instruction by teachers qualified to teach health education. A school district shall not offer this instruction unless a sex education advisory board is established by the board of the school district. The board of a school district shall determine terms of service for the sex education advisory board, the number of members to serve on the advisory board, and a membership selection process that reasonably reflects the school district population, and shall appoint 2 co-chairs for the advisory board, at least 1 of whom is a parent of a child attending a school operated by the school district. At least 1/2 of the members of the sex education advisory board shall be parents who have a child attending a school operated by the school district, and a majority of these parent members shall be individuals who are not employed by a school district. The board of a school district shall include pupils of the school district, educators, local clergy, and community health professionals on the sex education advisory board. Written or electronic notice of a sex education advisory board meeting shall be sent to each member at least 2 weeks before the date of the meeting. The advisory board shall do all of the following:

(a) Establish program goals and objectives for pupil knowledge and skills that are likely to reduce the rates of sex, pregnancy, and sexually transmitted diseases. This subdivision does not prohibit a school district from establishing additional program goals and objectives that are not contrary to this section, section 1169, or section 1507b.

(b) Review the materials and methods of instruction used and make recommendations to the board of the school district for implementation. The advisory board shall take into consideration the school district's needs, demographics, and trends, including, but not limited to, teenage pregnancy rates, sexually transmitted disease rates, and incidents of student sexual violence and harassment.

(c) At least once every 2 years, evaluate, measure, and report the attainment of program goals and objectives established under subdivision (a). The board of a school district shall make the resulting report available to parents in the school district.

(6) Before adopting any revisions in the materials or methods used in instruction under this section, including, but not limited to, revisions to provide for the teaching of abstinence from sex as a method of preventing unplanned or out-of-wedlock pregnancy and sexually transmitted disease, the board of a school district shall hold at least 2 public hearings on the proposed revisions. The hearings shall be held at least 1 week apart and public notice of the hearings shall be given in the manner required under section 1201 for board meetings. A public hearing held

pursuant to this section may be held in conjunction with a public hearing held pursuant to section 1169.

(7) A person shall not dispense or otherwise distribute in a public school or on public school property a family planning drug or device.

(8) As used in this section, "family planning" means the use of a range of methods of fertility regulation to help individuals or couples avoid unplanned pregnancies; bring about wanted births; regulate the intervals between pregnancies; and plan the time at which births occur in relation to the age of parents. It may include the study of fetology. It may include marital and genetic information. Clinical abortion shall not be considered a method of family planning, nor shall abortion be taught as a method of reproductive health.

(9) As used in this section and sections 1506 and 1507a:

(a) "Class" means an instructional period of limited duration within a course of instruction and includes an assembly or small group presentation.

(b) "Course" means a series of classes linked by a common subject matter.

History: 1976, Act 451, Imd. Eff. Jan. 13, 1977;—Am. 1977, Act 226, Imd. Eff. Nov. 30, 1977;—Am. 1981, Act 87, Imd. Eff. July 2, 1981;—Am. 1993, Act 335, Imd. Eff. Dec. 31, 1993;—Am. 2004, Act 165, Imd. Eff. June 24, 2004.

Popular name: Act 451

ELLIOTT-LARSEN CIVIL RIGHTS ACT (EXCERPT)
Act 453 of 1976

37.2201 Definitions.

Sec. 201. As used in this article:

(a) "Employer" means a person who has 1 or more employees, and includes an agent of that person.

(b) "Employment agency" means a person regularly undertaking with or without compensation to procure, refer, recruit, or place an employee for an employer or to procure, refer, recruit, or place for an employer or person the opportunity to work for an employer and includes an agent of that person.

(c) "Labor organization" includes:

(*i*) An organization of any kind, an agency or employee representation committee, group, association, or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment.

(*ii*) A conference, general committee, joint or system board, or joint council which is subordinate to a national or international labor organization.

(*iii*) An agent of a labor organization.

(d) "Sex" includes, but is not limited to, pregnancy, childbirth, or a medical condition related to pregnancy or childbirth that does not include nontherapeutic abortion not intended to save the life of the mother.

History: 1976, Act 453, Eff. Mar. 31, 1977;—Am. 1978, Act 153, Imd. Eff. May 22, 1978;—Am. 1980, Act 202, Imd. Eff. July 18, 1980.

THE MICHIGAN PENAL CODE (EXCERPT)
Act 328 of 1931

750.34 Advertising relating to sexual diseases.

Sec. 34. A person who advertises in his or her own name or in the name of another person, firm or pretended firm, association, or corporation or pretended corporation, in a newspaper, pamphlet, circular, periodical, or other written or printed paper, or the owner, publisher, or manager of a newspaper or periodical who permits to be published or inserted in a newspaper or periodical owned or controlled by him or her, an advertisement of the treating or curing of venereal diseases, the restoration of "lost manhood" or "lost vitality or vigor", or advertises in any manner that he or she is a specialist in diseases of the sexual organs, or diseases caused by sexual vice or masturbation, or in any diseases of like cause, or shall advertise in any manner any medicine, drug, compound, appliance, or any means whatever whereby sexual diseases of men or women may be cured or relieved, or miscarriage or abortion produced, is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00.

History: 1931, Act 328, Eff. Sept. 18, 1931;—CL 1948, 750.34;—Am. 2002, Act 672, Eff. Mar. 31, 2003.

Former law: See section 1 of Act 62 of 1911, being CL 1915, § 15512; and CL 1929, § 16877.

THE MICHIGAN PENAL CODE (EXCERPT)
Act 328 of 1931

750.40 Private diseases; conceptive preventatives; publication of cures.

Sec. 40. Publication in indecent language of cures for private diseases and conceptive preventatives—The publication or sale within this state of any circular, pamphlet or book containing recipes or prescriptions in indecent or obscene language for the cure of chronic female complaints or private diseases, or recipes or prescriptions for drops, pills, tinctures, or other compounds designed to prevent conception, or tending to produce miscarriage or abortion is hereby prohibited; and for each copy thereof, so published and sold, containing such prohibited recipes or prescriptions, the publisher and seller shall each be guilty of a misdemeanor.

History: 1931, Act 328, Eff. Sept. 18, 1931;—CL 1948, 750.40.

Former law: See section 2 of Act 106 of 1869, being CL 1871, § 7725; How., § 9311; CL 1897, § 11728; CL 1915, § 15522; and CL 1929, § 16884.

REVISED JUDICATURE ACT OF 1961 (EXCERPT)
Act 236 of 1961

600.2922a Wrongful or negligent act resulting in miscarriage, stillbirth, or physical injury; liability; exceptions; "physician or other licensed health professional" defined.

Sec. 2922a. (1) A person who commits a wrongful or negligent act against a pregnant individual is liable for damages if the act results in a miscarriage or stillbirth by that individual, or physical injury to or the death of the embryo or fetus.

(2) This section does not apply to any of the following:

(a) An act committed by the pregnant individual.

(b) A medical procedure performed by a physician or other licensed health professional within the scope of his or her practice and with the pregnant individual's consent or the consent of an individual who may lawfully provide consent on her behalf or without consent as necessitated by a medical emergency.

(c) The lawful dispensation, administration, or prescription of medication.

(3) This section does not prohibit a civil action under any other applicable law.

(4) As used in this section, "physician or other licensed health professional" means a person licensed under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838.

History: Add. 1998, Act 211, Eff. Jan. 1, 1999;—Am. 2002, Act 164, Imd. Eff. Apr. 11, 2002.

Compiler's note: Enacting section 1 of Act 164 of 2002 provides: "Enacting section 1. This amendatory act applies to a cause of action arising on or after May 1, 2002."

THE MICHIGAN PENAL CODE (EXCERPT)
Act 328 of 1931

750.14 Miscarriage; administering with intent to procure; felony, penalty.

Sec. 14. Administering drugs, etc., with intent to procure miscarriage—Any person who shall wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall be guilty of a felony, and in case the death of such pregnant woman be thereby produced, the offense shall be deemed manslaughter.

In any prosecution under this section, it shall not be necessary for the prosecution to prove that no such necessity existed.

History: 1931, Act 328, Eff. Sept. 18, 1931;—CL 1948, 750.14.

Constitutionality: Section held unconstitutional as relating to abortions in the first trimester of a pregnancy as authorized by the pregnant woman's attending physician in the exercise of his medical judgment. People v. Bricker, 389 Mich. 524, 208 N.W.2d 172 (1973).

Former law: See section 34 of Ch. 153 of R.S. 1846, being CL 1857, § 5744; CL 1871, § 7543; How., § 9108; CL 1897, § 11503; CL 1915, § 15225; CL 1929, § 16741; sec. 35 of Ch. 153 of R.S. 1846; Act 61 of 1867; CL 1871, § 7544; How., § 9109; CL 1897, § 11504; CL 1915, § 15226; and CL 1929, § 16742.

THE MICHIGAN PENAL CODE (EXCERPT)
Act 328 of 1931

750.15 Abortion, drugs or medicine; advertising or sale to procure; misdemeanor.

Sec. 15. Selling drugs, etc., to produce abortion—Any person who shall in any manner, except as hereinafter provided, advertise, publish, sell or publicly expose for sale any pills, powder, drugs or combination of drugs, designed expressly for the use of females for the purpose of procuring an abortion, shall be guilty of a misdemeanor.

Any drug or medicine known to be designed and expressly prepared for producing an abortion, shall only be sold upon the written prescription of an established practicing physician of the city, village, or township in which the sale is made; and the druggist or dealer selling the same shall, in a book provided for that purpose, register the name of the purchaser, the date of the sale, the kind and quantity of the medicine sold, and the name and residence of the physician prescribing the same.

History: 1931, Act 328, Eff. Sept. 18, 1931;—CL 1948, 750.15.

Former law: See section 1 of Act 138 of 1873, being How., § 9312; CL 1897, § 11729; CL 1915, § 15523; CL 1929, § 16885; section 3 of Act 138 of 1873, being How., § 9314; CL 1897, § 11731; CL 1915, § 15525; CL 1929, § 16887; section 2 of Act 138 of 1873, being How., § 9313; CL 1897, § 11730; CL 1915, § 15524; and CL 1929, § 16886.

REVISED JUDICATURE ACT OF 1961 (EXCERPT)
Act 236 of 1961

600.2971 Wrongful birth or wrongful life claims; prohibitions; exceptions.

Sec. 2971. (1) A person shall not bring a civil action on a wrongful birth claim that, but for an act or omission of the defendant, a child or children would not or should not have been born.

(2) A person shall not bring a civil action for damages on a wrongful life claim that, but for the negligent act or omission of the defendant, the person bringing the action would not or should not have been born.

(3) A person shall not bring a civil action for damages for daily living, medical, educational, or other expenses necessary to raise a child to the age of majority, on a wrongful pregnancy or wrongful conception claim that, but for an act or omission of the defendant, the child would not or should not have been conceived.

(4) The prohibition stated in subsection (1), (2), or (3) applies regardless of whether the child is born healthy or with a birth defect or other adverse medical condition. The prohibition stated in subsection (1), (2), or (3) does not apply to a civil action for damages for an intentional or grossly negligent act or omission, including, but not limited to, an act or omission that violates the Michigan penal code, 1931 PA 328, MCL 750.1 to 750.568.

History: Add. 2000, Act 423, Eff. Mar. 28, 2001.

Compiler's note: Enacting section 1 of Act 423 of 2000 provides:

"Enacting section 1. This amendatory applies only to cause of action arising on or after the effective date of amendatory act."